Supreme Court, U.S.
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No._____

In The

Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN

Petitioner,

v.

JOHN RODNEY MCRAE

Respondent.

On Petition for Writ of Certiorari to the Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Sixth Amendment prohibits the police from interrogating a defendant after the adversarial process has begun, but does not prevent the defendant from asking to speak with the police or from speaking with old friends. Here, an incarcerated defendant asked to speak with an old friend who also happened to be a part-time, volunteer, reserve deputy sheriff.

The questions presented are:

1. Where the defendant made admissions about the crime to his friend, a part-time volunteer, reserve deputy sheriff, during their conversation, does the Sixth Amendment prevent the admission of this testimony?

2. What are the standards by which a court determines whether the conversation that they shared was, for Sixth Amendment purposes, the action of a state agent?

PARTIES TO THE PROCEEDING

In the courts below, the State of Michigan was the prosecution authority represented by both the Prosecutor of Clare County and by the Attorney General of Michigan. The State of Michigan is the Petitioner before this Court after the ruling of the Michigan Supreme Court that reversed the conviction and remanded the case for retrial.

The Respondent is John Rodney McRae. Mr. McRae was the defendant in the prosecution. He was convicted of first degree murder after a jury trial and was the prevailing party in the Michigan Supreme Court.

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OPINIONS BELOW

In a pretrial order that is relevant for this appeal, on August 27, 1998, the trial court denied respondent's motion to exclude the testimony of Dean Heintzelman regarding the post-indictment admissions that respondent made to him while respondent was in jail.

On December 11, 1998, respondent was convicted of first-degree premeditated murder. The trial court sentenced him to life in prison without parole on January 4, 1999.

On January 12, 2001, the Michigan Court of Appeals affirmed the conviction in an unpublished, per curiam opinion. *People v. John Rodney McRae*, (No. 217052). This opinion of the Court of Appeals held that any error regarding the testimony of Heintzelman was harmless beyond a reasonable doubt. In a peremptory order, the Michigan Supreme Court reversed the Court of Appeals as to its finding of harmless error and remanded to the Court of Appeals for consideration of respondent's claim that the admission of testimony violated his Sixth Amendment right to counsel. *People v. McRae*, 465 Mich. 874; 634 N.W.2d 361 (2001).

On remand, on February 12, 2002, the Michigan Court of Appeals again affirmed respondent's conviction in an unpublished, per curiam opinion. *People v. John Rodney McRae*, (No. 217052). On April 22, 2004, in a 5-to-2 opinion, the Michigan Supreme Court reversed the Court of Appeals decision, vacating respondent's conviction, and remanding for new trial based on its determination that respondent's defendant's Sixth Amendment right to counsel was violated. *People v. McRae*, 469 Mich. 704; 678 N.W.2d 425 (2004).

JURISDICTION

The Michigan Supreme Court issued its final decision on April 22, 2004, reversing the murder conviction of the Respondent and remanding the case for a new trial. This final decision of the State's highest court was based exclusively *upon the United States Constitution, Sixth Amendment.* Jurisdiction of this Court to issue Certiorari to the Michigan Supreme Court is invoked under the authority of 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the interpretation of the Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, or to have the assistance of counsel of his defence.

STATEMENT OF THE CASE

This case arises out of Respondent John McRae's 1998 conviction of murdering and mutilating a young neighbor boy. This is his second such conviction. In 1950, in Macomb County, Michigan, when he was fifteen, Respondent slashed a nine-year-old boy to pieces with a straight razor. App. 133a-134a. He was convicted as an adult and spent the next 22 years serving out a life sentence. The Governor of the State of Michigan commuted his sentence to "time served" and Respondent was released in 1972.

Respondent left Michigan for several years and he returned in the early 1980s. He eventually settled just outside the tiny rural town of Harrison in central Michigan where he lived until 1987. No one in the Harrison area, including law enforcement, knew of John McRae's past. He had married and had a son who attended the local middle school. Another child who attended that school was Randy Laufer, who was 15-years old. Laufer was known to be friends with Respondent and his son, Martin. He regularly visited at Respondent's family home in the woods south of town. One of Respondent's few neighbors in that sparsely populated area was Dean Heintzelman, who lived with his wife and son "down the road." App. 123a-126a.

On September 15, 1987, Randy Laufer disappeared after leaving school. He was never again seen alive by his family. He was reported to and treated by the Sheriff as a runaway. App. 88a. In late November or December of 1987, Respondent packed up his family in the middle of the night and left Michigan. He left so quickly that his nearest neighbor only knew he had left when she woke up the next morning and found Respondent's family dog chained to her tree with a note pinned to his collar. App. 93a-94a. After Respondent left the community, the Sheriff learned about McRae's prior conviction and began to investigate the case as something more than a runaway child. App. 88a-90a.

The case went cold with no new evidence until August 20, 1997. The McRae homestead had been purchased by a neighbor and the buildings were razed and turned into a horse pasture. App. 95a-96a. A farm hand was instructed to take a backhoe and dig a pit to bury the concrete remnants of a small barn that had been on the property. When he lifted a scoop of dirt, the farm hand found Randy Laufer's skeleton. App. 102a. Forensic analysis showed that the boy had been tortured in a sexually sadistic manner (App. 170a-171a) --the body had been cut into at least two parts (App. 138a-140a) -- and then buried in a five foot deep hole dug under the gravel driveway that had been between the small barn and the door of Respondent's house trailer. App. 145a-146a.

In September 1997, Respondent was charged with first-degree premeditated murder, and he was extradited back to Michigan from Mesa, Arizona. App. 110a. Respondent was provided with a court-appointed attorney who represented him throughout the trial process. No member of the investigation or prosecution team attempted to speak with Respondent after he was arraigned. Respondent was held in the maximum security wing of the Clare County jail in Michigan, in a two-cell block. He was allowed visitation by his wife, Barbara, while he awaited the next stage of the criminal process, the preliminary examination. That occurred in January 1998.

During one or more of the visits by his wife, Respondent asked her to pass the word that he would enjoy a visit from his old neighbors. His wife understood that to be a reference to Dean Heintzelman, since the two men were friends when Respondent and his family had lived in the area. Dean Heintzelman's mother worked as a volunteer at the Sheriff's Department and Barbara McRae told her that her husband (Respondent) would like a visit from Heintzelman. The message was then passed to Dean Heintzelman. App. 54a, 62a-63a.

Although Heintzelman earned his living as a heavy equipment operator (App. 203a), he, like his mother, served as an unpaid, part-time volunteer reserve officer at the County Sheriff's Department. App. 203a. At a subsequent hearing in the trial court, he described his duties: "I go on transport, transport prisoners. We take care of ball games, do security at ball games. We help with visitation at the jail. That sort of stuff." App. 204. In addition, when the skeleton of Randy Laufer was discovered, Heintzelman was one of several people assigned to guard the perimeter of the gravesite overnight, until the Michigan State Police forensic evidence team could arrive the next day. App. 112a. Heintzelman had no investigative responsibilities in this case and there is no evidence that he ever had any investigative responsibilities under any circumstances.

On December 7, 1997, Heintzelman finished a prisoner transport assignment and was back at the jail in the late evening, after 11:00 PM. He decided to take that opportunity to visit with his old friend, Respondent McRae. App. 208a. Heintzelman went back to the cellblock and obtained permission from the turnkey to see McRae. The lights were still on in the cell area and Heintzelman was still wearing the uniform of a reserve deputy. App. 208a-209a. As he approached the cell, Respondent rose to meet him. The two old friends shook hands through the cell bars and Respondent showed Heintzelman pictures of his family. App. 194a. They chatted casually until Heintzelman asked Respondent if he

really did what he was charged with. Respondent did not answer. App. 208a. Heintzelman mentioned that the prosecution had charged his son, Martin, as an accessory to the crime.[1] In response, McRae said, "Well, if they try to pin it on Marty, I'll let 'em fry my ass." Heintzelman then again asked, "John, did you do it?" Respondent hung his head down and said, "Dean, it was bad. It was bad." Heintzelman became so angry that he left the cellblock without further conversation. App. 208a-209a.

Regarding the conversation, Heintzelman explained he spoke with Respondent as an old neighbor and friend of Respondent and was not there in his capacity as a reserve deputy. Specifically, he testified, App. 59a-60a:

> Q. Before you asked him those questions, did you give him what is commonly called the *Miranda* warnings?
>
> A. There was no reason to. I mean, why? Why would I? I wasn't – it was just like if I had known you for years.
>
> Q. You didn't feel at that point in time it was necessary that you explain to him that he had a right to remain silent or that he needed – that he had a right to have an attorney there if you were going to question him?
>
> A. No, we was [sic] talking like friends, just like I'd be talking to you.

---

[1] Martin McRae had been arrested simultaneously with respondent in Arizona. He had been charged as an accessory-after-the-fact on the theory that he dug the burial pit that held the victim. The case against Martin McRae was later dismissed at the examination stage on a jurisdictional issue because he had been a minor at the time of his alleged involvement. However, at the time of the meeting between respondent and Dean Heintzelman, the case against Martin McRae was still pending. Respondent knew of pending proceedings involving his son.

Q. So that was your view that you were asking-

A. Yeah.

Q. Questions about this case as a friend?

A. Yeah. Yeah, as a neighbor and everything, you know.

Sometime later Heintzelman informed the Sheriff's detective lieutenant of the conversation. The prosecution then gave Respondent immediate informal notice and, on June 3, 1998, gave formal notice of the intent to introduce the evidence of Respondent's statements to Heintzelman at trial.

On August 27, 1998, the trial court held a hearing to determine the admissibility of the contested evidence including Respondent's statements to Heintzelman. The court had before it the testimony of Dean Heintzelman, Respondent McRae, Respondent's wife, Barbara McRae, and a jail cellmate of Respondent named Kerry Kocis. At the conclusion of the hearing the judge held as follows, App.81a:

> Well, the issue for the Court, as far as the Court is concerned, is why was Mr. Heintzelman back there. Was he back there as a police officer on police duties at that point in time, or was he back there at the request of the defendant, and *it seems pretty evident to the fact that he was back there at the request of the defendant.* He wanted to talk to him. The defendant did. And so he's the one who initiated the conversation. And the fact that it got into culpability relative to this particular situation does not mean or does not change the fact as to what the requirements of the law are as far as what the police officer had to do. [Emphasis added.]

The court then issued an order denying the motion in limine to suppress the statement. App. 81a, 48a.

On December 11, 1998, Respondent was convicted of first-degree premeditated murder. On January 4, 1999, the trial judge imposed a mandatory sentence of life in prison.

Respondent appealed by right and, on January 12, 2001, the Michigan Court of Appeals affirmed his conviction. App. 39a-47a. As to the issue of the Heintzelman evidence, the Michigan Court of Appeals did not reach the issue of the constitutionality of the encounter. Instead, the Court found that the error, if any, was harmless beyond a reasonable doubt in light of the other overwhelming evidence of guilt.

Respondent appealed to the Michigan Supreme Court. In an order dated September 19, 2001, the Michigan Supreme Court found that any error regarding the admission of Respondent's statements to Heintzelman would not be harmless and remanded it to the Court of Appeals for a determination whether there was error. App. 37a. On February 12, 2002, the Court of Appeals again issued an opinion (after remand) and affirmed the conviction after reconsideration as directed by the Supreme Court. App. 27a-36a.

On June 19, 2003, Respondent was next granted a delayed leave to appeal to the Michigan Supreme Court on the sole issue of the admissibility of the Heintzelman statements. On April 22, 2004, the Michigan Supreme Court issued a 5-to-2 opinion reversing Respondent's conviction and remanding the case for retrial. App. 1a-27a. The Michigan Supreme Court based its reversal of conviction on its conclusion that Respondent's Sixth Amendment rights had been violated by admitting the evidence of the conversation between him and Dean Heintzelman.

REASONS FOR GRANTING THE WRIT

Introduction

This Court has never established criteria for determining when a person acts as an agent of the government for Sixth Amendment purposes although State and lower federal courts have, on occasion, described various factors to be considered. The Michigan Supreme Court's decision neither announces nor follows any apparent guidelines for making such a determination. Such an ad hoc determination provides no guidelines for either law enforcement or for trial courts and contradicts the basic framework employed by other State and federal courts. This Court should grant certiorari and provide workable criteria for guidance in Sixth Amendment cases. Also, this Court should address the issue of "harmless error" in the context of the Sixth Amendment under these circumstances.

I. The Sixth Amendment prohibits the police from interrogating an accused after the adversarial process has begun, but does not prevent the accused from asking to speak with the police or from speaking with old friends. Here Respondent asked to speak with an old friend who also happened to be a part-time, police officer and, during their conversation, Respondent made admissions about the crime. The Sixth Amendment does not prevent the admission of this testimony.

A. This Sixth Amendment protects an accused from interrogation by the government after his right to an attorney attaches.

The Sixth Amendment protects an accused from efforts by the government to obtain incriminating statements from him, after indictment, in the absence of his attorney, even at pretrial stages of the judicial process. When the right to counsel has attached, statements obtained without waiver of that right are

inadmissible, regardless of any issue of coercion as the rule applies with equal force where the accused is not aware that he is being interrogated. *Massiah v. United States,* 377 U.S. 201, 202 ; 84 S. Ct. 1199; 12 L. Ed. 2d 246 (1964).

After commencement of the government's case, the Sixth Amendment guarantee of counsel, applies anytime the government uses an agent to acquire incriminating statements from the defendant. See, e.g., *United States v. Henry,* 447 U.S. 264; 100 S. Ct. 2183; 65 L. Ed. 2d 115 (1980). In *Henry*, this Court examined a case where investigators used the services of a frequent jailhouse informant who was paid when he obtained evidence. A threshold consideration of this Court was that the informant "was acting under instructions as a paid informant for the Government[.]" *Id.,* 447 U.S. at 269. Even though the FBI agent submitted an affidavit that he instructed the informant not to initiate conversations on the subject of the charges against Henry, the circumstances of the incarceration and the informant's prior aggressive investigation techniques made it clear that such instructions would not restrain the informant from interrogating Henry on behalf of the government. This was especially true due to the contingent fee basis of payment for the agent-informant. *Henry, supra,* 447 U.S. at 270-271. See also *Maine v. Moulton*, 474 U.S. 159; 106 S. Ct. 477; 88 L. Ed. 2d 481 (1985) (after the accused had been indicted, the government's use of codefendant as a secret government agent violated the accused's Sixth Amendment right to counsel).

In *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981), this Court established the bright-line rule that an accused who expresses a desire to deal with the police only through counsel in pre-arraignment interrogations may not be subject to further interrogation by the authorities until counsel has been made available unless the accused initiates further communication:

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot

> be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. [footnotes omitted.]

The *Edwards* bright-line rule was developed in the context of Fifth Amendment protections against coerced confessions occurring during pre-arraignment custodial interrogations after an accused requested counsel. The Court previously explained that any exchange between the police and a suspect after he has invoked his right to an attorney that is designed to elicit damaging admissions is interrogation. See *Brewer v. Williams*, 430 U.S. 387, 403; 97 S. Ct. 1232; 51 L. Ed. 2d 424 (1977) (the "Christian burial speech" between the officers that triggered the suspect's confession violated the suspect's Sixth Amendment right to counsel because it was improper interrogation).

The *Edwards* rule was later extended to cover post-arraignment interrogations in a Sixth Amendment context in *Michigan v. Jackson*, 475 U.S. 625, 632; 106 S. Ct. 1404; 89 L. Ed. 2d 631 (1986):

> [T]he Sixth Amendment right to counsel at a post-arraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation.
>
> Indeed, after a formal accusation has been made – and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment – the

> constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation. Thus, the surreptitious employment of a cellmate, see [*Henry*, *supra*] or the electronic surveillance of conversations with third parties, see [*Maine v. Moulton*, *supra*] and; [*Massiah*, *supra*], may violate the defendant's Sixth Amendment right to counsel even though the same methods of investigation might have been permissible before arraignment or indictment. Far from undermining the *Edwards* rule, the difference between the legal basis for the rule applied in *Edwards* and the Sixth Amendment claim asserted in these cases actually provides additional support for the application of the rule in these circumstances.

The Sixth Amendment protection is guaranteed in order to assure that an unsophisticated accused has professional representation when the criminal law system is actively arrayed against him. See *United States v Gouveia,* 467 U.S. 180, 189 (1984) ("[the Sixth Amendment's] purpose [is to] protect[] the unaided layman at critical confrontations with his adversary"). This Court's cases make it clear that the "adversary" of an indicted criminal defendant is the government itself or an agent working at the direction of the government.

Respondent here was formally charged and had been provided with counsel at the time that he spoke with his old friend, Dean Heintzelman. Consequently, this case must be examined as a Sixth Amendment matter, which has different precedents and testing criteria than a Fifth Amendment case. See *Illinois v. Perkins*, 496 U.S. 292, 299; 110 S. Ct. 2394; 110 L. Ed. 2d 243 (1990) (the police did not violate the suspect's rights under the Fifth Amendment where the suspect made

admissions to an undercover agent before the adversarial process had begun).

The issue here is whether Heintzelman was a private party acting on his own or whether he was a government agent acting on behalf of the prosecution team.

B. This Court has not established a bright-line test for determining when a person acts as a government agent for Sixth Amendment purposes.

This Court has not defined when the person in communication with a criminal defendant is actually acting as a government agent for purposes of evaluating a possible violation of the Sixth Amendment. See *United States v. Taylor*, 800 F.2d 1012, 1015 (CA 10, 1986) ("We have been unable to find any bright line test for determining whether an individual is a Government agent for purposes of the Sixth Amendment right to counsel."); *Thomas v. Cox*, 708 F.2d 132, 136 (CA 4, 1983), *cert. denied*, 464 U.S. 918; 104 S. Ct. 284; 78 L. Ed. 2d 262 (1983) ("The point at which agency – hence proper attribution – for this purpose arises out of a government-citizen relationship is not subject to any bright-line test.").

The United States Court of Appeals for the Fourth Circuit identified this Court's three central cases, *Massiah v. United States, Brewer v. Williams,* and *United States v. Henry,* and noted that none had defined the nature of the person's relationship to the government to make him an "agent," *Thomas v Cox, supra,* 708 F.2d at 135:

> In none of the three principal decisions of the Supreme Court that define the reach of Sixth Amendment protections against government's "deliberate elicitation" of incriminating evidence from accused persons unaccompanied by counsel – *Massiah v. United States*; *Brewer v. Williams*; and *United States v. Henry* – has the "agency" of the person directly eliciting the

> evidence been the focal point of inquiry. But in each the necessity of such a relationship has been assumed. [citations omitted.]

Where the issue is whether the Sixth Amendment protections of an accused have been violated, irrespective of the formula used to determine whether there was an interrogation, the threshold question was whether the questioner was acting, at the critical time, as an agent of the government. The Fourth Circuit recognized this point, *Thomas v. Cox, supra*, 708 F.2d at 135:

> [W]here the citizen himself actively, though surreptitiously, elicits disclosures, the only question is whether at the critical time he was also a creature – an agent – of the state. If so, his deliberate elicitation of evidence is necessarily attributable to the state as would be that of a state official. [footnote omitted.]

See also, *United States v Taylor, supra,* 800 F.2d at 1015.

C. The test to determine whether a person who speaks with an accused after arraignment is a government agent must focus primarily on the purpose of the interaction.

As the Fourth Circuit in *Thomas v. Cox* recognized, the major cases that discuss whether a violation of the Sixth Amendment right to counsel might have occurred assume the agency status of the person who questioned the accused. Where the real issue is, in fact, the existence of that agency status itself, few courts have attempted to delineate criteria to guide this threshold inquiry. This lack of guidance is especially apparent where the questioner is not a jail cellmate or an accomplice informant.

Nevertheless, consistent with the purpose of the Sixth Amendment of "protecting the unaided layman against . . . his

adversary," see *Gouveia, supra,* the federal appellate courts have recognized that the examination whether a person who has met with an indicted criminal defendant has acted as a government agent focuses on the purpose of the meeting – whether the meeting was designed to improve the quality or quantity of evidence the government had against the accused. See, e.g., *United States v. Birbal*, 113 F.3d 342, 346 (CA 2, 1997), where the Second Circuit cited five different circuit courts of appeal in support of its analysis and determined that agency turned on whether the informant was instructed to "get information" from the accused:

> An informant becomes a government agent for purposes of [the Sixth Amendment] only when the informant has been instructed by the police *to get information* about the particular defendant. [emphasis added.]

In fact, apart from the jailhouse informant situation, two courts have specifically evaluated the status of a person interacting with the accused after the Sixth Amendment right had attached. Those courts tried to develop criteria by which to determine whether the person acted for the government as its agent.

First, in *United States v. Gaddy*, 894 F.2d 1307, 1309-1311 (CA 11, 1990), the Eleventh Circuit examined a habeas corpus case where a murder suspect, after asserting his Fifth and Sixth Amendment rights, was called by his aunt, a police officer, and she encouraged him to confess to the detectives. The Court held that there was no Sixth Amendment violation because at the time, despite her official status, the aunt was not acting in furtherance of the investigation.

In reaching this conclusion, the Court focused on the fact that the aunt was not part of the investigative team, was not directed by a superior to contact the suspect, had acted solely out of concern for the defendant's welfare, and that there was no evidence that the aunt had been acting in the normal course

of her duties when she initiated contact with her nephew, 894 F.2d at 1311:

> [B]y encouraging Danner [the defendant] to tell the police what he knew, [Janice Hernandez, a county police officer and the aunt of the defendant] acted as a worried aunt who envisioned the hardship that could befall her nephew if he did not reveal the information he possessed, especially before Gaddy [codefendant] rendered his version of the events to the police.
>
> The evidence shows that at the time Hernandez contacted Danner she was employed by the Chatham County Police Department, but that even though she was a police officer, her duties were not investigative in nature. She contacted Danner of her own accord, not at the direction of a superior and not for the benefit of the police department. She made no written report following that communication, as would have been customary had Hernandez been acting in an official capacity. Thus, no police-initiated interrogation occurred. [Paragraph break added.]

Further, the Court found that the aunt "could have taken the same action had she been reached at her home, as a private citizen who might provide a lead to the detectives." *United States v Gaddy, supra,* 894 F.2d at 1311.

Second, in *Cook v. State of Georgia,* 270 Georgia 820; 514 S.E.2d 657 (1999), the Georgia Supreme Court had before it a case of a young man charged with a double murder. He was charged and had exercised his Fifth and Sixth Amendment rights. He asked to speak with his father at the same time that he demanded an attorney. The defendant's father, an FBI agent, spoke with his son at the jail. At trial, the prosecution

introduced the defendant's admissions to his father. The defendant was convicted and his appeal was based upon an argument that he was interrogated by his father in violation of his Sixth Amendment right to counsel.

The Georgia Court affirmed the conviction and the admission of the evidence obtained by the father. In reaching this decision, the Court reviewed numerous factors to determine whether the FBI agent-father was acting as a state agent or was acting in his private capacity as the father of the suspect. The Georgia Court listed the factors that the Eleventh Circuit had weighed in *Gaddy* and listed the corresponding facts as it related to the case, 270 Georgia at 827:

> (1) John Cook [the defendant's father] was not part of the investigative team on the Lake Juliette murders (in fact, the FBI did not have jurisdiction to investigate the case);
>
> (2) Cook asked to see his father at the same time he requested an attorney;
>
> (3) John Cook was not directed by any law enforcement agent connected with Cook's case to speak to his son – he made the request on his own initiative;
>
> (4) John Cook's motive in speaking with his son was to urge him to cooperate in the hope of getting a plea bargain; and
>
> (5) the interview involved hugging and crying by father and son which is not typical of a police interrogation. [Formatting added.]

Therefore, in summary, like the Eleventh Circuit, the Georgia Court considered the following factors:

(1) whether the person was a part of the investigative team in the case in question;

(2) whether the person was directed by a superior to speak with the suspect;

(3) whether the person acted solely out of concern for the welfare of the suspect;

(4) whether the person acted in the normal course of his duties when talking with the suspect; and

(5) whether the interview involved typical police interrogation tactics and techniques.

These factors focus on *the purpose of the visit*, examining whether the friend or family member was acting at the behest of, and under the direction of, the government and was attempting to improve the quality of the government's case against the suspect, which is consistent with the Second Circuit's analysis in the informant context. See *Birbal, supra,* 113 F.3d 342.

The *Gaddy* test eliminates the need for discussion of non-essential circumstances such as whether the person was actually employed by the government, was on or off duty, in uniform or out, or what time of day the meeting occurred. A civilian citizen could be made a government agent and violate the Sixth Amendment protections of a suspect if instructed and sent by the State to question the defendant. See *Moulton, supra.* Conversely, a police officer who is an old friend and neighbor of a defendant is not necessarily an agent of the government when he visits a defendant at the defendant's request.

D. Applying the proper standards, the person who interacted with defendant here, Dean Heintzelman, was not a government agent. There was no Sixth Amendment violation.

Applying the *Gaddy* factors, the record is clear that Dean Heintzelman was acting as Respondent's friend, not as a government agent.

First, Dean Heintzelman was never a member of the investigative team in this case. His sole prior contact with the case was to guard the perimeter of the crime scene overnight until the state police forensic evidence team arrived the next morning.

Second, there is no evidence that any superior of Dean Heintzelman or member of the prosecution directed Heintzelman to speak with the suspect. On the contrary, the record in this case is clear and undisputed that Respondent, acting through his wife, specifically invited Heintzelman to come visit with him at the jail. Heintzelman did not advise any police superior or prosecution official before he went to see Respondent.

Third, Heintzelman was speaking with Respondent as an old friend, out of concern for his friend. The only evidence as to the motive for Dean Heintzelman to speak with Respondent came in response to cross-examination when Heintzelman was asked whether he had read *Miranda* rights to Respondent McRae, App. 59a-60a:

> There was no reason to. I mean, why? Why would I? I wasn't – it was just like if I had known you for years.

* * *

> No, we was [sic] talking like friends, just like I'd be talking to you.
>
> * * *
>
> Yeah, as a neighbor and everything, you know. App. 59a-60a.

Fourth, the normal course of Dean Heintzelman's duties as a volunteer reserve deputy was typically crowd control for parades on the Fourth of July and similar holidays or at county baseball games. Occasionally, he was called upon to transport prisoners from one county jail to another, as occurred on the night of his meeting with Respondent. App. 208a. Heintzelman did not have any investigative responsibilities with respect to this case or any other criminal investigation.

Fifth, and finally, this interview did not follow typical police interrogation tactics and techniques. Respondent was physically separated from Heintzelman by the bars of his cell. App. 56a. There was another inmate, Kerry Kocis, observing the conversation from a few feet away. App. 64a-65a. Moreover, contrary to the ordinary circumstances of a police interrogation, Respondent showed Heintzelman pictures of his family to catch up with past events. App. 208a. Furthermore, when Respondent made his incriminating response, Dean Heintzelman reacted as a betrayed friend rather than as a detective. He stormed out of the cellblock. App. 209a. Typical police interrogation tactics would have demanded that the officer immediately pursue the opening in an effort to obtain a complete confession. If the goal of this meeting was to improve the government's case, Heintzelman would have capitalized upon the obvious opening Respondent had given him.

It was only after the fact, that Dean Heintzelman reported the incident to the detective-lieutenant in charge of the investigation. Only then did he offer to return and continue interrogating Respondent. He was instructed by those who

were charged with investigating and presenting the case not to have further contact with Respondent. App. 10a, 60a-61a. Dean Heintzelman was a private person – an old friend and neighbor – acting solely in that capacity at the time of his only encounter with Respondent.

E. The Michigan Supreme Court effectively rejected the other court decisions, establishing a conflict between it and federal and other State jurisdictions, by wrongly examining factors relevant for Fifth Amendment consideration and failing to examine the purpose for which Dean Heintzelman was speaking with Respondent, which was as a friend, not as a government agent.

The Michigan Supreme Court ruled that Dean Heintzelman was at the relevant time a state actor. Significantly, however, the Court recognized that "*[d]efendant merely initiated a social visit with his old friend and neighbor*" at the time he made the damaging admissions to Heintzelman. *Michigan v McRae,* 469 Mich. 704, 717; 678 N.W.2d 425 (2004). App.13a.

The Michigan Court did not concentrate on recognized criteria for determining Heintzelman's agency status but instead focused on facts only relevant in determining whether coercive forces were employed by the State at the time of the meeting. The Court considered that Heintzelman visited Respondent while in uniform, visited him late at night, and asked him twice whether he committed the crime. The Court apparently considered Heintzelman to be part of the "police team" because he assisted the sheriff in guarding the gravesite of the victim overnight until the State Police forensic evidence team could come to the scene the next morning.[2]

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[2] Nevertheless, the record was clear that Heintzelman never had any investigative responsibilities in this or any other investigation. When questioned under oath, Heintzelman described his duties as crowd control

While these criteria might have been applicable in examining whether there was coercion if this had been a Fifth Amendment issue, these factors considered by the Michigan court are irrelevant for Sixth Amendment purposes when determining whether Dean Heintzelman was acting as an agent of the government during his encounter with Respondent, or whether he was a private person who happened to be wearing the uniform of a sheriff deputy during the friendly visit requested by Respondent.

Moreover, the record is devoid of any evidence that Respondent felt coerced to say anything. Respondent testified at a pretrial suppression hearing on this issue and never said he felt compelled to answer any of Dean Heintzelman's questions. The described behavior of the two men demonstrated a relaxed conversation between old neighbors. The men shook hands through the bars of the jail cell. They spoke about their respective families. Respondent showed Heintzelman photos of his son and grandchildren.

The Michigan Supreme Court based a significant part of its analysis on *Griffin v. Maryland*, 378 US 130; 84 S. Ct. 1770; 12 L. Ed. 2d 754 (1964) to show that Heintzelman acted with apparent authority. *Griffin* involved a private park employee who had been deputized by the county sheriff. He used that deputization to arrest five African Americans for criminal trespass when they would not leave the park. This Court found that he had apparent authority as a sheriff deputy and "purported to exercise the authority of a deputy sheriff." *Griffin, supra,* 378 U.S. at 135.

The reliance by the Michigan court on this case was erroneous. The question in *Griffin* was whether a private person could, by grant, exercise a portion of the police power of the State. Here, the question is whether an unpaid part-time

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on holidays and occasionally transporting prisoners to and from the county jail. App. 204a.

volunteer for the government can engage in conversation without acting on behalf of the government. In *Griffin,* the park officer clearly held himself out as a government agent and initiated the action under review. The case could not have existed if he had not acted with the power of a law enforcement officer by arresting the victims. But, here, Heintzelman did not hold himself out as a government agent and was not acting under purported government authority. Rather, he was acting as a friend. Heintzelman did not initiate this encounter; it was started by Respondent's invitation. The Michigan Supreme Court's majority opinion, relying as it does so heavily upon the *Griffin* apparent authority language, sweeps so broadly that, as recognized by the dissent in *McRae*, 469 Mich at 727, App. 25a:

> [The majority] [c]oncluded that someone who happens to have volunteered as a part-time, reserve police officer cannot ask a friend about a crime with which he has been charged without running afoul of the Sixth Amendment.

The Michigan Court considered that Heintzelman was in a sheriff deputy uniform, that he mentioned that the Respondent's son also faced charges, and that he asked the critical question twice. These are Fifth Amendment questions. They do not address whether Heintzelman was sent in to get information from Respondent or whether he was acting on behalf of the government. Even though this Court was speaking in the context of interrogation by an undisclosed informant, it recognized the difference between Fifth Amendment and Sixth Amendment concerns, *Henry*, *supra*, at 447 U.S. at 273:

> That line of argument, however, seeks to infuse Fifth Amendment concerns against compelled self-incrimination into the Sixth Amendment protection of the right to the assistance of counsel.

The Michigan Supreme Court recognized that determining whether Dean Heintzelman was a government actor at the time of his encounter with Respondent was the core issue in the appellate review. The court then reached a decision that ignored the primary purpose of his conversation with Respondent. In fact, the court's characterization of the conversation as a "social visit" contradicts its conclusion that Heintzelman was acting as a government agent. The essential fault of the decision below is that it ignored the focal question as stated by the Second Circuit: Was Heintzelman instructed by anyone involved in the prosecution to get information about Respondent? *Birbal, supra.* *Gaddy* and *Cook* provided a standard for answering that question, a standard that the Michigan Supreme Court effectively rejected.

The Michigan Supreme Court majority erred in finding that the Sixth Amendment rights of Respondent were violated. Dean Heintzelman was someone who visited an old friend, Respondent, at Respondent's request, because he wanted visitors. During their conversation, Respondent admitted to Heintzelman that the crime "was bad." The fact that Heintzelman was an off-duty, reserve deputy sheriff did not transform this social visit into government action. This was a conversation between friends. There was no violation of the Sixth Amendment. The Michigan Supreme Court was wrong to overturn Respondent's conviction for murder on this basis.

II. Any error that may have resulted from the introduction of evidence of Respondent's statement to Dean Heintzelman is harmless beyond a reasonable doubt in light of the additional, overwhelming, valid evidence of guilt.

A. Procedural Background.

The Michigan Court of Appeals, upon first review, refused to rule on the constitutionality of Respondent's admissions to Heintzelman under the Sixth Amendment. Rather, the Michigan Court of Appeals held that even if there were error it

was harmless due to the overwhelming weight of the other admissible evidence demonstrating Respondent's guilt. *People v. McRae,* Michigan Court of Appeals unpublished *per curiam* opinion, January 12, 2001 (No. 217052). App. 46a.

In an interlocutory appellate ruling, the Michigan Supreme Court remanded the issue to the Court of Appeals upon a finding that if the statement were error, this error would not be harmless beyond a reasonable doubt. *People v. McRae,* 465 Mich 874; 634 N.W.2d 361 (2003). The Michigan Supreme Court rendered this decision without any analysis of the other evidence in the record. The interlocutory order stated in its entirety, App. 37a:

> On order of the Court, the delayed application for leave to appeal from the January 12, 2001, decision of the Court of Appeals is considered and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we VACATE, in part, the judgment of the Court of Appeals and REMAND this case to that court for reconsideration of the defendant's claim of error with regard to the testimony of witness Heintzelman concerning defendant's alleged statement. In its opinion in this matter, the Court of Appeals, while declining to decide whether there was in fact error, went on to decide that if there had been error, it was harmless beyond a reasonable doubt. We disagree. *If the admission of that statement was error, the error was not harmless beyond a reasonable doubt.* Accordingly, on remand, the Court of Appeals shall directly decide whether the admission of this testimony was error and, if it decides that it was, shall reverse the defendant's conviction and remand for a new trial. In all other respects, leave to appeal is DENIED. [Emphasis added.]

B. The Michigan Supreme Court erred when it failed to recognize that the admission of Respondent's statements was harmless in light of the other overwhelming evidence of guilt.

This Court has jurisdiction to review a State court determination of whether an alleged Federal Constitutional error was harmless. In *Chapman v. California,* 386 U.S. 18, 21; 87 S. Ct. 824; 17 L. Ed. 2d 705 (1967), where the prosecutor repeatedly commented during trial upon the defendants' failure to testify, this Court rejected the proposition that all constitutional error must be harmful and thus reversible.

With regard to an alleged violation of an accused's Sixth Amendment right to counsel, this Court has specifically recognized that such an error may be harmless. *Milton v. Wainwright*, 407 U.S. 371, 33 L. Ed. 2d 1, 92 S. Ct. 2174 (1972). In *Milton*, the Court rejected a defendant's Sixth Amendment claim without reaching the issue because any error was harmless beyond a reasonable doubt, 407 U.S. at 372:

> [Defendant] [c]ontend[s] that the statements he made to the officer were involuntary under Fifth Amendment standards and were obtained in violation of his Sixth Amendment rights as subsequently interpreted in *Massiah v. United States*, 377 U.S. 201 (1964)[.]
>
> * * *
>
> [W]e have concluded that the judgment under review must be affirmed without reaching the merits of petitioner's present claim. Assuming, arguendo, that the challenged testimony should have been excluded, the record clearly reveals that any error in its admission was harmless beyond a reasonable doubt.

Hence, any error here is subject to harmless error analysis.

In a review of when the harmless error standard is appropriate to judge allegations of constitutional violations, this Court stated, in *Sullivan v. Louisiana,* 508 U.S. 275, 278-279; 113 S. Ct. 2078; 124 L. Ed. 2d 182 (1993):

> The *Chapman* standard recognizes that "certain constitutional errors, no less than other errors, may have been 'harmless' in terms of their effect on the fact finding process at trial."
>
> * * *
>
> Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error...." [Citations omitted; emphasis in original.]

Here, the Michigan Supreme Court summarily concluded that the statement obtained by Dean Heintzelman could not have been harmless. The Court reached this result without any analysis of the additional evidence in the record or balancing the equivocal impact of Respondent's statement to Heintzelman with the other proofs.

The evidence at trial demonstrated that young Randy Laufer was a neighbor of Respondent and frequently visited the

McRae home. App. 125a-126a. The victim disappeared on September 14, 1987 (App. 119a-121a), while Respondent lived at that home site. Soon after the boy disappeared, McRae packed up his family in the middle of the night and moved across the country. The victim's body was found on August 20, 1997, buried in the gravel driveway that had separated Respondent's small barn and the rear door of his trailer home (approximately 15 feet from his rear door). Laufer's skeleton showed several knife cut marks on the inner surface of the sacrum that could only reasonably be interpreted as multiple rectal stabbings.

There was an additional confession by Respondent admitted into evidence that was not constitutionally challenged. The Michigan Supreme Court totally ignored this fact in its summary ruling. While Respondent shared a cellblock with an inmate named Travis Troost, in July of 1997, he admitted killing the victim (although he blamed it on an "altercation" rather than a sadistic, sexually motivated assault). App. 189a. He stated to Travis Troost that the police had it wrong when they assumed he killed the boy with a knife because in fact, he explained, he shot him twice with a bolt-action single-shot 22-caliber rifle. App. 189a, 191a.

The detective in charge of the investigation, Lt. Mark McClellan, had no intimation that a firearm was involved with the murder and there were no known press reports that mentioned a gun. App. 109a-110a. Nevertheless, Patrick Agin, another friend of Respondent's son, totally independent of Troost, corroborated the fact that Respondent maintained a 22 caliber, single shot, bolt action rifle in his home before Laufer disappeared. App. 152a-153a. Troost would not have had any other means of knowing about this specifically described weapon other than Respondent telling him. Respondent also admitted to Travis Troost that after burying the boy, he spread goat manure over the gravesite to prevent the cadaver dogs from picking up the scent of his victim. App. 189a, 191a.

In addition to the testimony from Travis Troost, the jury heard evidence that Respondent committed a strikingly similar murder earlier in his life in which the victim, Joey Housey, was also a young boy. Housey's body was also violated in a sexually oriented effort at dismemberment and apparent torture. Both a forensic psychologist and a forensic psychiatrist explained that Respondent's earlier crime and the crime at bar were driven by the same relatively rare motivation, sexual sadism. App. 157a-160a; 170a-172a; 179a-181a.

Consequently, Respondent's ambiguous incriminating statement to Dean Heintzelman had no substantial or injurious effect on jury deliberations when evaluated in the context of the otherwise overwhelming, valid evidence that proved his guilt beyond a reasonable doubt. If anything, Respondent's admission to Heintzelman was merely cumulative to the testimony of Troost. The admission of this evidence, even if a violation of Respondent's right to counsel, was harmless beyond a reasonable doubt.

The Michigan Supreme Court was wrong to reverse the conviction of a child murderer, in spite of the other overwhelming evidence of guilt, on the basis of technical ruling that could not have been foreseen or anticipated. Respondent's admission to Heintzelman was only a small piece of evidence in the array of proof showing guilt. Any possible error regarding Respondent's admission to Heintzelman had no bearing on the jury's verdict.

CONCLUSION

Petitioner, State of Michigan, asks this Court to grant certiorari and to reverse the judgment of the Michigan Supreme Court that Respondent's Sixth Amendment rights of counsel were violated when he initiated a conversation with an old friend who happened to be a part-time, off duty, reserve sheriff's deputy and in the course of that meeting made an incriminating admission.

Respectfully submitted,

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